Neutral Citation Number: [2019] EWHC 2430 (Ch)

Case No: HC-2008-000028

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 23/09/2019

**Before**:

**CHIEF MASTER MARSH**

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**Between :**

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|---|---|
| **(1) Phillip David Gregory**<br>**(2) William John Wilkins** | **Claimants** |
| **- and -** | |
| **(1) Julianna Moore (Formerly known as Ganna Ziuzina)**<br>**(2) Irene Hayman Pring (on her own account and as executor of the estate of Basil John Pring)**<br>**(3) Shaughan Pring (as executor of the estate of Basil John Pring)** | **Defendants** |

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**John McLinden QC** (instructed by **John F.S. Cabot Solicitors**) for the **First Defendant**
**Leslie Blohm QC** (instructed by **Stephens Scown LLP**) for the **Second and Third Defendants**
**(The Claimants did not appear at the hearing)**

Hearing dates: 4 September 2019

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHIEF MASTER MARSH

## Chief Master Marsh:

1. This claim is proceeding between the first defendant on the one hand and the second and third defendants on the other hand. It arises out of the death of Barry Pring late on the evening of 16 February, or in the early hours of 17 February, 2008 in Ukraine. He was struck while standing on the hard shoulder of the M06, part of the E40 Autoroute, by a vehicle travelling at some speed. The vehicle did not stop and the identity of the driver is not known. Barry Pring had been dining with his Ukranian wife, who is the first defendant, to celebrate their first wedding anniversary at a nearby restaurant in the village of Milla (otherwise Myla).

2. Barry Pring died intestate and had no children. His estate is represented by the second and third defendants who are respectively his mother and his brother. I will refer to them as The Family. I will refer to the first defendant as Ms Moore although at the time of her husband's death she was known as Ganna (or Anna) Ziuzina.

3. The circumstances of Barry Pring's death are highly controversial. The background to the claim is set out in my judgment handed down on 6 September 2018 and does not need to be repeated here. The Family seek to establish that Ms Moore aided, abetted or procured her husband's death and is therefore treated as having unlawfully killed him for the purposes of section 1(2) of the Forfeiture Act 1982. They have no direct evidence of communications between Ms Moore and the driver of the vehicle that collided with Barry Pring or with a co-conspirator before or after Barry Pring's death. The case they put forward is entirely based on inference.

4. Three points of context relating to the hearing on 4 September 2019 need to be stated:

    (1) The trial of the claim under section 1(2) of the Forfeiture Act 1982 is in a window commencing on 11 November 2019 with a time estimate of 10 days. Disclosure and exchange of witness statements have taken place in accordance with the order made on 3 August 2018.

    (2) That order made provision for expert evidence in the following way:

        "(18) The parties having identified the potential need for expert evidence from a road traffic accident analyst and cell phone location analyst, the issue as to whether expert evidence is required will be permitted shall be adjourned. Any party seeking such expert evidence shall make application to the court within 28 days of the conclusion of the second inquest alternatively no later than 4PM on 29 March 2019, whichever is the earlier."

    (3) When my judgment was handed down on 6 September 2018, the second inquest[1] into Barry Pring's death was due to take place in early 2019. It will not now take place until after the trial of this claim. The Family will not therefore be able to benefit from any evidence that the Coroner is able to obtain from the authorities in Ukraine. It follows that the date by which an application for permission to rely on expert evidence should have been made was 29 March 2019. No application was made by that deadline.

[1] The verdict of unlawful killing at the first inquest was quashed.

5. One of the central issues in the Family's claim concerns Ms Moore's movements in the early hours of 17 February 2008. Their pleaded case is set out in paragraph 8(14) of their amended points of claim:

> "The First Defendant stated in interview with the Ukrainian police that after returning to the apartment at about 2am on 17 February 2008 she remained there for the remainder of the morning. The statement was untrue and false. Between approximately 3am and 5am the First Defendant had returned to the village of Shpitki which is approximately 3 to 4 kilometres from Milla. The First Defendant had also been in the vicinity of Shpitki on 10 and 13 February 2008. It is to be inferred that the First Defendant travelled and retuned to Shpitki in the aftermath of the incident in order to meet the driver of the Volkswagen Jetta."

6. In her points of defence, Ms Moore denies that she went to Shpitki after Barry Pring's death but does not admit whether she was in that area on 10 and 13 February. She says she had been there on numerous occasions and cannot recall whether she was there on those dates.

7. Evidence which may tend to support the Family's case pleaded in paragraph 8(14) of their amended points of claim is on any view central to their case. The Family seek to rely on evidence of Ms Moore's whereabouts before and after her husband's death that was obtained in the criminal investigation carried out by the authorities in Kiev. This can be seen from the Letter of Request for Assistance sent to the United Kingdom Government by a Senior Investigator and other officials of the Investigation Department of the Main Department of the Ministry of Internal Affairs in Kiev Region on 15 November 2012.

8. In the immediate aftermath of Barry Pring's death, an investigation was opened into an offence of causing death by dangerous driving by the driver of the vehicle. In 2012, the General Prosecutor of Ukraine changed the basis of the investigation to one of intentional murder. The letter of request is surprisingly forthright and states a number of conclusions arising from the investigation including that Ms Moore had given false testimony in the pre-trial investigation. The letter says that:

> "- After receiving and studying the printing information about the incoming and outgoing calls from the number of a phone, which was used by Ganna Ziuzina was found that a few days before the event, Ganna visited the Shpitki village … including the night of February 14, 2008. The above village was located about 5 to 7 kilometers from the crime scene in Zhitomir city direction. Immediately after the crime, Ganna announced that she felt bad and about 2.00 of February 17, 2008 went home, but during the time period from 3.00 to 5.00 of February 17, 2008 she was visiting Shpitki Village for unknown reasons.". [sic]

9. It is clear, therefore, that a review of Ms Moore's mobile phone records was undertaken as part of the investigation carried out in Ukraine. However, there is inadequate information about by whom it was carried out and what methodology was used. As a general observation it would have been helpful had the parties assisted the court with three matters:

(1) The applicable provisions of the Ukranian Criminal Procedure Code and the normal approach to a criminal investigation in Ukraine including the type of documents that record steps in the investigation in Ukraine.

(2) The approach in Ukraine to producing evidence of location based upon the location of a mobile telephone and who normally analyses the data.

(3) What data is needed for the purposes of identifying the location of a mobile phone user, the degree of expertise that is required and the likely accuracy of the information derived from the analysis.

10. On 26 April 2019, Ms Moore applied for the court for orders restricting the evidence that is relied upon by the Family. The principal orders they seek are that:

(1) paragraph 7.21 of the witness statement of Oleg Myhajlovych Salenko ("Mr Salenko") should be struck out and the Family be precluded from adducing the maps to which he refers; and

(2) the Family should be precluded from producing at the trial a document described as "Minutes of Document Review Dated 22 August 2012" which, along with other documents, is the subject of a hearsay notice served by the Family on 12 April 2019.

11. The application seeks relief in the alternative that Mr Salenko be ordered to provide a further witness statement explaining the genesis of the maps he exhibits and/or Ms Moore should be granted permission to adduce expert call data/cell phone location evidence about Mr Salenko's evidence and the Minutes of Document Review.

12. The application is supported by a full witness statement made by Ms Moore's solicitor, Mr John Cabot. It is matter of regret that the family's evidence given by Catherine Mathews of Stephens Scown LLP was only served on 30 August 2019 some four months after service of the application and just two working days before the hearing. Mr Blohm QC, who appeared for the Family, felt constrained by privilege from providing any explanation for the delay. I conclude that late service of the witness statement was intended to disrupt the proper conduct of the application. The delay is all the more egregious in light of the fact that the hearing was originally listed to be heard on 4 July 2019. This would have been a far more suitable date bearing in mind the trial date. However, the hearing was vacated and re-fixed at the request of Stephens Scown. The 4 September 2019 was the earliest alternative date.

**Access to the file of the Ukranian prosecuting authorities**

13. This is a subject that is only indirectly relevant to the application. There is an issue between the parties about the extent to which the prosecution file that is held in Ukraine has been made available to them. I am told that the victim of a crime may obtain documents from the file but that it is a criminal offence to use documents from the file for any purpose other than the prosecution. The Family was able to obtain a large quantity of documents from the file by Mr Slipenko, the Family's lawyer in Ukraine, taking some 3,700 photographs of documents contained in 17 volumes of prosecution files. He says in a statement made for the benefit of the Coroner who is undertaking the second inquest that he did not photograph files containing

information obtained "from the mobile phone companies". I am told, however, that the files photographed by Mr Slipenko contained some phone records but only two pages relate to the period proximate to Barry Pring's death.

14. Ms Moore's position in relation to the prosecution file is revealed to a limited degree by her list of documents served pursuant to the order for disclosure. She was able to obtain, through her Ukranian lawyer, documents from the police file pursuant to article 221 of the Ukranian Criminal Procedure Code. She has disclosed "various documents … from the criminal prosecution files of the Ukranian authorities…" but has refused to give inspection of them on the basis that article 222 of the Code prohibits disclosure of such documents without the permission of the relevant authority and no permission has been given. In the absence of permission disclosure of documents obtained from the file would be an offence under article 387 of the Code. She does not say, however, if permission has been sought. No application has been made under CPR 31.19(5) challenging the claim to withhold inspection.

**Mr Salenko's witness statement**

15. Mr Salenko was a police officer in Ukraine until 1996. Between 2003 and 2013 he worked at the Falsification and Patenting Monitoring Bureau (FPMB) as a Head of the Security Department. He was instructed in April 2008 by the Family to investigate Barry Pring's death. He says that during his investigation he had meetings with various witnesses who had information about Barry Pring's life in Ukraine and about his death. He was in contact with the police investigator and he provided information to the investigator. He goes on to set out in his statement information that he learned. It includes a series of bare assertions. Ms Moore objects to the assertion at paragraph 7.21:

> "7.21 Anna Ziuzina was near the scene before and after Barry Pring's death.
>
> I found out this information from the police investigator, Roman Dovzhenko, who was investigating the circumstances of Barry Pring and who I often met in April – May 2008. During this time, I produced various maps and annotated these to mark the whereabouts of [Ms Moore] after Barry was killed. The maps were produced based on information that I got fro [sic] the police investigator Roman Dovzhenko, who was investigating the circumstances of Barry Pring at that time, with whom I used to meet often in April – May 2008."

16. The Family has not provided a witness statement from Mr Dovzhenko. Ms Moore says that Mr Dovzhenko would not have had the necessary expertise to analyse mobile phone data because he was a Senior Investigator of the Car Accident Investigation Department of the Investigation Department of the Ministry of Internal Affairs of Ukraine in the Kiev Region and in that capacity as an accident investigator mobile phone analysis would have been outside his remit. However, she has not provided any evidence about the extent to which expertise is necessary to review the records of a mobile phone company dealing with the location from which calls were made and, if it is, who might have undertaken the analysis.

17. Ms Moore objects to paragraph 7.21 both on the ground that it is opaque and that it is expert evidence which is not admissible without permission being given by the court.

The reason for her complaint becomes clear when three of the 'marked terrain maps'[2] are considered. In fact, they are obviously not maps because they are not a diagrammatic representation of an area of land. Rather, they are photographic images of areas of land obtained from Google Earth. Three have been annotated. I will refer to them as OMS 1, 2 and 3. OMS3 appears to record coordinates that will enable the location shown in the image to be determined with precision.

18. OMS 1 is an image of a road with houses on one side. Red lines have been added which appear to have the purpose of marking a route alleged to have been taken by Ms Moore. It is annotated with the words: "POSSEBE – ACCIDENT CAR + GANNA WENT THERE FROM 3 TILL 5 MORNING" [sic]. I take "Possebe" to be a typographical error for "possible" or "possibly".

19. OMS 2 is an image of an area crossed by roads with houses alongside. Approximately in the centre of the image there is a large building that is roughly square in shape that appears to surround an internal courtyard. The building is highly distinctive due to its size and shape when compared with other buildings in the images. A red line passes across the image appearing to show a direction of travel. More significantly, the central area of the image has been ringed with a blue line that is oval in shape with the distinctive building roughly at its centre. The annotation that relates to the ringed area reads: "GANNA WAS IN THIS AREA AFTER ACCIDEND – 100%" [sic].

20. OMS 3 is a similar image to OMS 2. It differs in two ways. First, the image is of a slightly different area to that shown in OMS 2, albeit the images overlap. The distinctive building is in a different place in the image and the red line follows an extended path. Secondly, there are two parts of the image that are ringed. The first area ringed is roughly circular. It is similar to the ringed area on OMS2, but it is distinctly different. The second ringed area intersects with the first (as in a Venn diagram) and is in the shape of a flattened circle. It is not clear to what area of the image the annotation "GANNA WAS THERE" relates but it clearly indicates, on any view, that she was in the general vicinity of the distinctive building. Since this is inconsistent with her case that she stayed at her flat, the precise location where it is suggested her mobile phone was detected may not be critical to the Family's case.

**Minutes of Document Review ("the Protocol")**

21. The document that is relied upon is the translation of a document from Ukranian into English with the original text on the left side of the page and the translation on the right. It is dated 21 August 2012 and describes itself as a "Protocol of Documents Inspection". It may be something has been lost in translation and it seems likely that 'protocol' is used in the sense of 'summary'. In any event, the document is the product of a procedure forming part of the criminal investigation that has no obvious analogy in an investigation in this jurisdiction. The Protocol and a translation were disclosed by the Family in the course of disclosure in this claim provided pursuant to the order dated 3 August 2018.

22. The Protocol was produced by Captain Zaiets, an acting investigator with the Department of Internal Affairs. It is a compilation of information obtained from Ms Moore's mobile phone records between 6 January and 24 February 2008. The record

[2] As they are described in the Family's disclosure.

was produced in front of, or with the assistance of, two witnesses who have countersigned the Protocol with Captain Zaiets. It appears to be a careful compilation of relevant information. The Protocol records that Captain Zaiets inspected "… printouts from the mobile operator number MTS 0503525041, which according to the criminal case materials was used by Ziuzina GV, printouts from the numbers of Kyivstar mobile operator 097-750-74-61, 067-466-72-52 and printouts with information on subscriber's calls in the area of base units LAC 27001 CID 6103, 6843, 6842, 4842,: LAC 27010 CID 9681".

23. It is recorded that the inspection of documents took place pursuant to three provisions of the Criminal Procedure Code of Ukraine. However, neither side was able to provide the court with those provisions and it is impossible to know, therefore, what the status of the document is in accordance with local law.

24. On its face, the Protocol records both use of the mobile phone and the location of the phone when it was used. The Protocol concludes with a summary of the locations at which the mobile phone was in use:

> "Analyzing [sic] the indicated printouts for the period from 06.01.2008 to 24.02.2008 it can be concluded that [Ms Moore] most often was at [an address in Kiev]."

This is followed by an analysis of use of the phone in the early hours of 17 February 2008 which is consistent with the observation made in the Letter of Request about Ms Moore's presence in the village of Shpitki shortly after Barry Pring's death. There is nothing to suggest that particular expertise was required to make the compilation and there is no assessment on the face of the protocol of the relative strengths of a signal from the respective base units. The analysis appears to have involved no more than extracting data from the records provided by the mobile phone company and compiling them in a chronological form.

25. The Protocol was included in a Hearsay Notice served pursuant to section 2 of the Civil Evidence Act 1995 and CPR 33.2 dated 12 April 2019. The documents that are its subjects are all, unhelpfully for present purposes, described as being "… witness statements provided to police officers in Ukraine investigating a potential crime." The notice is based on the premise that the makers of the statements are resident in Ukraine, that they were given to officers proximate to the events and it is unlikely the witnesses will have any recollection of the matters referred to in their statements.

26. On any view the Protocol is not a witness statement provided to the police and it is not a statement in a form that complies with the CPR. However, it is signed by Captain Zaiets and also signed by the two witnesses. It is clearly a formal record of an inspection of mobile phone records.

27. Ms Moore's case is that the protocol is neither a statement nor admissible expert evidence. She says that the pinpointing of the whereabouts of her mobile phone could only derive from an expert and it is therefore inadmissible without the court's permission.

## The Law

28. The starting point is the admissibility of opinion evidence, whether or not hearsay. This question has been considered in a number of recent authorities starting with the decision of the Court of Appeal in *Hoyle v Rogers* [2014] EWCA Civ 257 which was applied by Nugee J in *Mondial Assistance (UK) Ltd v Bridgewater Properties Ltd* [2016] EWHC 3494 (Ch) and Henry Carr J in *Illumina, Inc and another v TDL Genetics Ltd* [2019] EWHC 1159 (Pat).

29. *Hoyle v Rogers* concerned the admissibility of a report of the Air Accident Investigation Branch ("AAIB") for the purposes of a claim made by Mr Rogers' executors in relation to his death in an air crash in a plane piloted by Mr Hoyle. The task of the AAIB is to investigate accidents and serious incidents involving aircraft. It operates under regulations made under the Civil Aviation Act 1982. The court held that the report was admissible both for its record of factual evidence, of whatever degree of hearsay, and its expert opinion. In fact, the report contained expert opinion evidence from a number of sources and those whose opinions were recorded were not identified. A clear distinction emerges from the judgment of Christopher Clarke LJ, who gave the only judgment, between expert evidence that is covered by CPR 35 and that which is not. CPR 35 only relates to expert evidence from an expert "…who has been instructed to give or prepare expert evidence for the purpose of proceedings."[3] Expert evidence prepared for other purposes, such as for the AAIB, does not fall within CPR 35 and is not subject to its restrictions.

30. *Mondial Assistance* and *Illumina, Inc* both provide illustrations of the principles set out in the judgment of Christopher Clarke LJ in *Hoyle v Rogers*. It suffices to adopt the summary of the principles provided in the judgment of Henry Carr J in *Illumina, Inc* at [18]:

> "(i) If opinion evidence is tendered and the evidence is of an expert qualified to give expert evidence within section 1(1)[4] of the Civil Evidence Act 1972, then it is prima facie admissible, even if tendered in hearsay form, by a combination of section 1(1) of the 1972 Act and section 1(1) of the 1995 Act.
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> (ii) That admissibility is not affected by the provisions of CPR Part 35 unless the report is the report of an expert within the meaning of CPR35.2(1). If the report is outside the purview of 35.2(1), then CPR Part 35 has no bearing on the question of its admissibility.
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> (iii) An example of opinion evidence which falls outside 35.2(1) is the report of the AAIB in *Rogers v Hoyle* itself. In that case, the AAIB was not instructed by the parties and the report was not commissioned for the purposes of the proceedings.
>
> (iv) Therefore, evidence by an expert who was not instructed by one of the parties to the proceedings in which it is sought to be adduced, or was not

[3] CPR 35.2
[4] The reference to section 1(1) of the 1972 Act must have been intended to refer to section 3(1) of that Act because section 1(1) is no longer in force.

> instructed for the purpose of those proceedings, does not fall within CPR Part 35, and permission to adduce it is not required."

31. It is important to note the qualification contained in section 3(1) of the 1972 Act. Opinion evidence is only admissible if it is on (a) a relevant matter and (b) a matter about which the witness is qualified to give expert evidence. It is the second condition that is relevant for the purposes of the application before me. To the extent there is any expert evidence contained in paragraph 7.21 of Mr Salenko's statement and/or the Protocol, it must be an opinion of a person who is qualified to give expert evidence. CPR 35 has no relevance because such expert evidence was not obtained for the purposes of these proceedings.

32. No authority on the subject of who is qualified to provide expert evidence was cited to me at the hearing. However, the analysis provided by Evans-Lombe J in *Barings plc v Coopers & Lybrand (No 2)* [2001] 1 Lloyd's Rep. Bank 85 at [45] is well known. He derived the following propositions from the authorities:

> "Expert evidence is admissible under section 3 of the Civil Evidence Act 1972 in any case where the court accepts that there exists a recognised expertise governed by recognised standards and rules of conduct capable of influencing the court's decision on any of the issues which it has to decide and the witness to be called satisfies the court that he has a sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving any of those issues."[5]

33. Some assistance on the subject of 'cell siting evidence', that is identifying the location of a mobile phone when it is used, can be derived from *R v Calland* [2017] EWCA 2308 (Crim). The use of such evidence in criminal prosecutions is of course more common than in civil claims. In the course of his judgment Holroyde LJ observed [30] that:

> "Call siting evidence can be powerful evidence. But it is not capable of locating a phone with pinpoint accuracy and it has other limitations."

34. Holroyde LJ went on:

> "31. It is therefore common place for the prosecution to adduce expert evidence as to whether, and if so to what extent, the fact that a mobile phone call was routed through a particular cell site is consistent with the phone and therefore its user being at a particular location at the time of the call. Such expert evidence often explains that mobile masts may be angled in one direction but not another and that range and extent of coverage varies from cell site to cell site and be affected by topographical features such as hills or tall buildings. Expert evidence often also explains that a mobile phone making a call in a particular location may be served by more than one cell site and the question may therefore arise as to which of the relevant sites provided the strongest signal and most likely to have transmitted a call from that location. Where expert evidence is given on this topic, it generally involves the witness having conducted a survey at the relevant

[5] This formulation echoes the classic test of admissibility provided by the South Australian Supreme Court in *R v Bonython* (1984) 38 S.A.S.R. 45 at [45] per King CJ.

> location, using specialist equipment capable of showing the comparative signal strengths of the cell sites concerned."

35. In many cases, an expert will provide both factual and opinion evidence. Typically, an expert will give evidence of matters that have been observed as part of providing evidence of opinion. Thus, a surveyor will provide observations about relevant matters from a site visit and a forensic accountant will describe what is contained in books and records. In some cases, evidence from an expert is merely evidence of facts or matters observed that because of their nature can only be understood by others who have the relevant expertise if they are conveyed through the explanation the expert provides. A scientist looking through a microscope may be giving evidence of fact about what can be seen. It is expert evidence because special training is required in order to identify what is being observed. In some cases, closer to the limits of knowledge that is common to a body of experts, the expert may also provide an opinion based on the observation.

36. It is clear from *Hoyle v Rogers* [31] that factual evidence, whether or not hearsay, that is recorded in a report such as the one from the AAIB, or the Protocol, is prima facie admissible.

37. Hearsay is generally admissible in civil proceedings: section 1(1) of the Civil Evidence Act 1995. Section 1(2)(b) makes it clear that references to hearsay means hearsay of whatever degree. Under section 2(1) notice of a proposal to adduce hearsay evidence must be served. Section 4 of the 1995 Act deals with the weight that is to be given to hearsay evidence and the court is entitled to have regard to "… any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence" including the factors that are set out in section 4(2).

38. The court has wide powers under CPR 32.1 to control evidence and the court is given an express power under CPR 32.1(2) to exclude evidence that would otherwise be admissible. Although Mr McLinden did not refer to Article 6 of the European Convention on Human Rights in oral argument, he submitted in his skeleton argument that particularly in a claim involving an allegation of murder the court should ensure that the principle of equality of arms should be carefully observed. It requires that each party should be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage: *Buchberger v Austria* 20/3/02 at [50]. However, it seems to me that the provisions of the CPR already provide the court with ample powers to ensure that a fair trial is possible. Resort to the ECHR adds nothing to the well-developed domestic jurisprudence.

39. It need hardly be said that the court needs to be very cautious about exercising the power to exclude evidence that is prima facie admissible before the trial because the trial judge will almost invariably be in a better position to weigh up the evidence that the court at an interlocutory stage. In a similar way, it will be for the trial judge to decide what weight should be given, if any, to hearsay evidence having regard its reliability taking into account all the circumstances that have emerged during the trial and the factors set out in section 4(2) of the Civil Evidence Act 1995.

### Paragraph 7.21 of Mr Salenko's witness statement

40. It is understandable why Ms Moore is troubled by this aspect of Mr Salenko's evidence. He provides in one sentence a conclusory statement that Ms Moore was near to the scene of the accident before and after his death. The basis for his statement is that this is what Mr Dovzhenko told him and that he produced what he describes as maps and annotated them based on information he was given by Mr Dovzhenko. However, he does not provide any explanation about how Mr Dovzhenko came this conclusion or the basis upon which the maps were annotated. The annotation includes not just remarks added by Mr Salenko but markings indicating the areas within Ms Moore was present. Nothing is said about mobile phone data being analysed by Mr Dovzhenko and based on the evidence produced on behalf of Ms Moore it seems unlikely that Mr Dovzhenko would have been able to produce the analysis himself.

41. There is, however, a weakness in Ms Moore's application, namely the absence of an explanation about how data from the use of a mobile phone is analysed. Mr Cabot merely asserts that the maps "… would normally be produced by an expert witness whose expertise lay in cell phone location analysis." It is notable that even he does not say that evidence of this type can only be produced by an expert. Unlike the prosecution in *R v Calland*, it suffices for the purposes of the Family's case to be able to place Ms Moore in the broad vicinity of Myla before and after the accident. It is not necessary to provide evidence of a precise location given that Myla is approximately 28 kilometres from Ms Moore's apartment in Kiev.

42. The court is not in a position to conclude that the annotations showing the approximate area where the phone signal was placed could only derive from an analysis undertaken by a person who is qualified to give expert evidence. It may be the case that, based upon a review of the call log from Ms Moore's phone that was shown to the court, and commented upon the statement of Catherine Mathews dated 30 August 2019, a lay person is able to draw some conclusions about the location of the phone, albeit with limited accuracy, merely by having regard to the mobile phone mast through which the call was made. That may not be the closest mast to the phone due to the topography of the area but is sufficient to put the phone in a broad area some considerable distance from Kiev.

43. It seems to me that despite the obvious deficiencies in paragraph 7.21, it contains hearsay evidence that is admissible. It records what Mr Salenko says he was told by the investigator. It is not possible to say with any certainty how Mr Dovzshenko obtained that information; it cannot be from the Protocol because it was not produced until 2012. However, it is possible that Mr Dovzshenko had access to the same phone records that were later relied on.

44. It is also not an objection to say that Mr Salenko and/or Mr Dovzshenko are providing inadmissible expert evidence. There are two possibilities. First, that the information that led to the annotation of the maps did not require an expert to express an opinion, in which event the evidence is hearsay fact. Alternatively, that the evidence derives from an as yet unnamed expert's opinion based on an analysis of the phone records (and possibly visits to the locations as well) in which event the evidence is admissible provided that it is evidence from a suitably qualified expert a matter about which the trial judge may be willing to draw conclusions favourable to the Family.

45. It would not be right, or helpful, for this court to speculate about the weight, if any, the trial judge may be willing to attribute to Mr Salenko's evidence. I am satisfied that it is prima facie admissible and it would wrong to exercise the power under CPR 32.1(2) to exclude it at this stage.

46. I should add that in his submissions Mr Blohm QC submitted that if Ms Moore is concerned about the opacity of Mr Salenko's evidence it is open to her to make a request, and if necessary seek an order, under CPR 18.1. It is right that the terms of CPR 18.1 are wide but even so they do not naturally lend themselves to a party seeking additional information about the evidence of a witness who is to be called by the other party which would be tantamount to cross-examination in advance of the trial. In any event, as it seems to me, CPR 18.1 is focussed upon a matter that is in dispute in the proceedings. It would have been open to Ms Moore to seek additional information about the case pleaded against her in paragraph 8(14) of the points of claim. She is not entitled to additional information about the evidence the Family wish to deploy at the trial when seeking to prove that element of their case.

**The Protocol**

47. It is tolerably clear that the Protocol is a formal document that is a compilation of evidence for the purposes of a pre-trial investigation under the Ukranian Criminal Procedure Code. How it might have been used at such a trial is uncertain.

48. It seems to me that it is a document that is broadly analogous to the report of AAIB in *Hoyle v Rogers*. It was produced by an official, in accordance with procedures under local legislation for the purposes of an inquiry into the death of Barry Pring. It records evidence that may be fact or opinion or, more likely, a combination of both. It is not an objection to say that the source of the evidence cannot be readily identified. In any event, for the reasons I have given, it is uncertain whether an expert was needed to produce the compilation. There is nothing in the Protocol itself to suggest that anyone other than Captain Zaiets and the two witnesses were involved and on its face it derives from a review by Captain Zaiets (whose technical expertise is unknown) of Ms Moore's telephone records.

49. I have pointed to the infelicities of drafting in the hearsay notice. However, they did not form the basis of the Ms Moore's application and are capable of being cured without difficulty.

50. In my judgment, the Protocol is admissible either as hearsay evidence of fact, or hearsay evidence of fact and opinion. I can see no compelling reason to exclude the Protocol from the evidence to go before the trial judge.

**Conclusions**

51. The principal relief that Ms Moore seeks will be dismissed. She is no longer seeking an order that Mr Salenko produces a further statement. It is not clear whether she now pursues her application for permission to rely on an expert on call data/cell phone location evidence concerning Mr Salenko's evidence and the content of the Protocol. I will hear submissions on this point, and on any other matters that arise when the judgment is handed down.